IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

FRIDAY, THE 24TH AUGUST 2007 / 2ND BHADRA 1929

WP(C).No. 15748 of 2004(Y)

PETITIONER:

P.K.MATHAI VAIDYAN, S/O.KUNJANDI VAIDYAN JUNIOR HEALTH INSPECTOR GRADE-II (RETIRED FROM PRIMARY HEALTH CENTRE, THAZHAVA) RESIDING AT PUTHENPURAKKAL, KADAPPA, THOTTUMMUGHAM P.O., MYNAGAPPALLY, KOLLAM DISTRICT.

BY ADV. SRI.M.V.THAMBAN
SMT.THARA THAMBAN

RESPONDENTS:
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1. **THE MEDICAL OFFICER-IN-CHARGE, PUBLIC HEALTH CENTRE, THAZHAVA, KOLLAM DISTRICT.**
2. **THE DISTRICT MEDICAL OFFICER, KOLLAM.**
3. **THE DIRECTOR OF HEALTH SERVICES, THIRUVANANTHAPURAM.**
4. **STATE OF KERALA, REPRESENTED BY THE SECRETARY TO THE GOVERNMENT, DEPARTMENT OF HEALTH & FAMILY WELFARE, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**

BY GOVERNMENT PLEADER SRI.NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/08/2007, THE COURT ON 24/08/2007 DELIVERED THE FOLLOWING:

W.P.(C0 NO.15748/2004

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE APPLICATION DT. 1.3.93 SUBMITTED BY PETITIONER TO THE 3RD RESPONDENT.

EXT.P2:- COPY OF THE LETTER NO.A4-9102/93 DT. 27.4.93 ISSUED BY 2ND RESPONDENT.

EXT.P3:- COPY OF THE LETTER DT. 7.7.93 ISSUED BY THE 2ND RESPONDENT.

EXT.P4:- COPY OF THE REPRESENTATION DT. 22.12.93 SUBMITTED TO THE 2ND RESPONDENT.

EXT.P5:- COPY OF THE SHOW CAUSE NOTICE NO.A6-20206/93/DMOH DT. 31.10.94 ISSUED BY THE 2ND RESPONDENT.

EXT.P6:- COPY OF THE LETTER DT. 24.11.94 SUBMITTED BY THE PETITIONER TO THE 2ND RESPONDENT.

EXT.P7:- COPY OF THE ORDER NO. A6-20206/93/DMOH DT. 22.6. 97 ISSUED BY THE 2ND RESPONDENT.

EXT.P8:- COPY OF THE APPEAL DT. 31.1.04 SUBMITTED BEFORE THE 3RD RESPONDENT.

EXT.P8(a):- COPY OF THE PETITION FOR CONDONATION OF DELAY DT. 31.1.04 FILED BY THE PETITIONER.

EXT.P9:- COPY OF THE JUDGMENT DT. 10.2.04 IN WP(C) NO.4813/04 OF THE HONOURABLE HIGH COURT OF KERALA.

EXT.P10:- COPY OF THE LETTER NO.PC-12843/04/GHS DT. 31.3.04 ISSUED BY THE 3RD RESPONDENT.

/TRUE COPY/

P.S. TO JUDGE

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ANTONY DOMINIC, J.

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without allowance for taking up employment abroad was granted initially for the period from 1-2-1978 to 31-1-1983 and this was extended on two occasions by 5 years each, until 31-1-1993. On its expiry though the petitioner rejoined on 1-2-1993, he availed of leave for 12 days from 4-2-1993 and thereafter half pay leave with effect from 16-2-1993 to 29-3-1993. He submitted Ext. P1 application dated 1-3-1993 for voluntary retirement from service with effect from 29-3-1993. The application was considered and was rejected by Ext. P3 dated 7-7-1993 primarily for the reason that an application for voluntary retirement should be submitted at least 3 months prior to the date of voluntary retirement from service. On receipt of the said communication the petitioner submitted Ext. P4 dated 22-12-1993 stating that due to certain personal affairs he was not able to rejoin duty after 30-3-1993 and that he was unaware of the requirement of 3 months' notice for voluntary

retirement and requested for taking steps to enable him to get the voluntary retirement sanctioned.

3. From paragraphs 4 and 5 of the counter affidavit it is seen that a memo of charge for unauthorised absence and dereliction of duty was issued and the petitioner submitted his statement of defence. Thereafter enquiry was fixed on 17-2-1994 with notice to the petitioner. But, however, he did not appear for the same. Again, after publication in the newspapers, the enquiry was scheduled on 26-4-1994 at the office of the District Medical Officer, Kollam on which occasion also the petitioner remained absent. Thereupon on the materials available before the enquiry officer, misconduct was found against the petitioner and a provisional decision to remove him from service with effect from 30-3-1993 was taken and Ext. P5 show cause notice in this behalf was issued to the petitioner at his residential address. This was responded by the petitioner by submitting Ext. P6

wherein he stated that although he was directed to rejoin duty he had not rejoined duty and that he was not in a position to rejoin duty. He requested that his application for voluntary retirement may be reconsidered enabling him to get pension. This was considered by the 2nd respondent, the disciplinary authority, who imposed the punishment of removal from service with effect from 30-3-1993, the date from which the petitioner has been unauthorisedly absenting from duty. The communication sent by registered post in this behalf also returned with the endorsement : "The addressee left India - Returned to sender." As a result of this the order was published in newspapers and Ext. P7 dated 22-6-1997 is one such publication.

4. Against Ext. P7 order the petitioner filed appeal with an application for condonation of delay, on 31-1-2004 and thereafter filed W.P.(C) No. 4813 of 2004 praying for an order for the disposal of the

same. The writ petition was disposed of by this Court by Ext. P9 judgment directing the authorities to pass orders on Exts. P8 appeal and P8(a) application for condonation of delay. The appellate authority thereafter considered the matter and passed Ext. P10 order rejecting the application for condonation of delay. It is in the aforesaid background this writ petition has been filed praying for the reliefs mentioned supra.

5. The learned counsel for the petitioner submits that Ext. P1 application for voluntary retirement was wrongly rejected by the authorities who ought to have considered the same in the light of the proviso to Rule 56(1) Part III, K.S.R. According to counsel, this rule enables the authorities to consider the application for voluntary retirement even if the notice thereof is for less than 3 months. It is submitted that consequent to the erroneous rejection of his application for voluntary retirement, he was

proceeded against in a disciplinary action and on account of his removal from service he has lost his eligibility for terminal benefits. It was submitted that the petitioner has attained the age of superannuation on 28-2-1996 and Ext. P7 order imposing punishment of removal was issued only on 22-6-1997. It being after his superannuation, is a void order, submits the counsel.

6. Alternatively it is contended that even if the misconduct is proved, the punishment imposed on the petitioner is disproportionate to the gravity of the misconduct. The learned counsel also submitted that it is obvious from Exts. P5 and P7 that enquiry was dispensed with and there was no circumstance warranting such a course. In support, the learned counsel referred to the judgment of the Division Bench of this Court in ***President of India v. Kunjappan*** {1985 KLT 232}. It was further contended that Ext. P10 order does not contain any reason and

therefore it reflects non-application of mind of the authorities, warranting reconsideration of the matter.

7. I have considered the submissions made by the learned counsel which were opposed by the learned Govt. Pleader.

8. Among the submissions made, the contention that since the petitioner had reached the age of superannuation on 28-2-1996, Ext. P7 order imposing punishment or removal issued on 22-6-1997 is void has to be dealt with first. The argument of the learned counsel is that since the employer-employee relationship ceased on 28-2-1996, an order of punishment in the nature of Ext. P7 could not have been issued thereafter. This argument is resisted by the Govt. Pleader by contending that Ext. P7 order is dated 22-6-1997 and the appeal against the said order was filed only on 31-1-2004. It is submitted that either in the appeal or in the writ petition, the

petitioner has not offered any explanation for the delay of almost 7 years. According to the learned Govt. Pleader even a void order remains effective unless it is invalidated in an appropriate proceedings.

9. Considering the submissions, I should agree with the counsel for the writ petitioner that the respondents were incompetent to pass Ext. P7 order once the petitioner had reached the age of superannuation on 28-2-1996. But then as rightly pointed out by the Govt. Pleader, even if I accept the said order is void, it is not invalid in all situations and the petitioner had a duty to approach the Court within a reasonable time. In this case there is an inordinate delay of 7 years and there is no explanation for the same. In such factual background the law laid down by the Supreme Court in ***State of Rajasthan v. D.R. Laxmi*** {(1996) 6 SCC 445} is apposite and the relevant portion is extracted

below for reference:

> "The question whether violation of the mandatory provisions renders the result of the action as void or voidable has been succinctly considered in Administrative Law by H.W.R. Wade (7th Edn.) at pp. 342-43 thus:
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> "The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. It any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another. A common case where an order, however void, becomes valid is where a statutory time limit expires after which its validity cannot be questioned. The statute does not say that the void order shall be valid; but by cutting off legal remedies it produces that result."

10. The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within

> reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances."

The dictum of the aforesaid judgment, applies in full force to the fact situation in this case and therefore I am not inclined to accept the contention of the learned counsel for the writ petitioner that the order should be set at naught at this distance of time. The learned counsel for the petitioner relied on the judgments in W.A. No. 3260/2000 and W.A. No. 1439/06 to contend that delay will not defeat his claim. On a reading of these judgments, I notice that these were rendered in the context of delay in claiming pensionary benefits. These cases were decided in different factual situations and hence, are inapplicable to this case. Regarding the

correctness of the rejection of the petitioner's application for voluntary retirement by Ext. P3, I notice that Rule 56 Part III, K.S.R. provides for 3 months' notice for an application for voluntary retirement. However, the proviso to Rule 56(1) enables the authorities to consider an application with lesser notice as well. In this case, the petitioner's contention is that the authorities should have considered his application in the light of the proviso. In my view, the petitioner is not justified in this contention. It is not the duty of the respondents to consider his application applying the proviso. On the other hand, if the petitioner wanted to avail of the benefit of the proviso, when the application for voluntary retirement was rejected by Ext. P3, the petitioner ought to have made a fresh application, instead of sending Ext. P4 letter, seeking the benefit of the proviso. The petitioner has not made such an application and in the absence

of which petitioner cannot say that the authorities are wrong in rejecting the application for want of required length of notice.

10. Even otherwise, I will not be justified in interfering with Ext. P3 order dated 7-7-1993 rejecting the application of the petitioner. If the petitioner was aggrieved, the petitioner ought to have challenged Ext. P3 within a reasonable time. Now in 2007 I will not be justified in upsetting a decision taken by the authorities in 1993. If the petitioner was vigilant he would have approached this Court and instead he did not take any step against Ext. P3 and on the other hand, chose to remain unauthorisedly absent from duties. Therefore, apart from merits, this contention of the petitioner is also liable to be rejected for the delay and laches on the part of the petitioner himself.

11. Next is the contention that the punishment is disproportionate to the misconduct. From the

facts it is obvious that from 1-2-1978 for 15 years the petitioner was on leave without allowance for taking up employment abroad. He returned on 1-2-1993 and immediately thereafter applied for leave till 29-3-1993. Though he ought to have resumed duties on 29-3-1993, he submitted Ext. P1 application for voluntary retirement which was rejected by Ext. P3 dated 7-7-1993. From 29-3-1993 onwards the petitioner was unauthorisedly absent. Disciplinary action was initiated, he was found guilty, Ext. P5 show cause notice was issued, punishment was imposed and his appeal was rejected and all these happened between 1993 and 2004. During this entire period also the petitioner remained absent and some of the communications were received by him, some were returned with the endorsement that the addressee left India and as a result thereof publication had to be carried out.

12. The indifference of the petitioner and the

dereliction of duty that he has committed need not be explained any further. At no point of time was he interested in rejoining duty. His only interest was to get pension as to make himself comfortable. This type of conduct does not deserve any leniency and the respondents were fully justified in removing him from service. The misconduct is grave and the punishment imposed is proportionate and I do not find any merit in the petitioner's contention in this regard.

13. I am not impressed by the submission that on account of his removal from service he has lost the terminal benefits that he would have got at least for 21 years of his service. In terms of rules as applicable to the petitioner, he is not entitled to get pension, on account of the punishment that he suffered. Since it was his misconduct that compelled the authorities to take action, petitioner cannot find fault with the authorities for having acted in terms of the rules governing him.

14. The contention of the petitioner that the enquiry against him was dispensed with and that there was no justifiable ground for the same is also unacceptable. It is obvious from Ext. P5 that memo of charges were issued to the petitioner and he submitted his written statement of defence. Thereafter on two occasions, with due notice, enquiry was scheduled by the disciplinary authority. But the petitioner remained absent. On account of this, the disciplinary authority examined the case in detail with the connected records and found the petitioner guilty. In this case, the misconduct of dereliction of duty was based on his unauthorised absence from duty and that fact is not disputed by the petitioner either before the disciplinary authority in the written statement of defence or even in the pleadings in this case.

15. True, Ext. P5 contains a statement that it was decided to dispense with the enquiry. This only

means that with the participation of the petitioner as enquiry could not be conducted, and that no further oral enquiry was conducted by the disciplinary authority. The enquiry officer on the other hand, arrived at his conclusions on the basis of the records. There is no procedural irregularity in the course of action adopted by the enquiry officer and the judgment of the Division Bench in 1985 KLT 232 relied on by the petitioner is totally inapplicable to the facts of this case.

16. I also do not find any substance in the contention that Ext. P10 does not contain any reason for the dismissal of the petitioner's appeal. As already stated, against Ext. P7 order dated 22-6-1997, petitioner filed Ext. P8 appeal along with Ext. P8(a) application for condonation of delay dated 31-1-2004. It was considering the application for condonation of delay that Ext. P10 order was passed. Since delay has not been condoned it was unnecessary

for the authority to have examined the various contentions raised by the petitioner in the memorandum of appeal. Ext. P10 discloses that cogent reasons have been given for rejecting the application for condonation of delay and hence there was no necessity to deal with the contention in the Appeal. Therefore, there is no merit in the argument that the appeal has been rejected without reasons.

17. For the aforesaid reasons I do not find merit in any of the contentions of the petitioner and this writ petition is only to be dismissed.

ANTONY DOMINIC
JUDGE

jan/-